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Supreme Court of the United States

OCTOBER TERM, 1954

No. 581

WILLIAM LUDWIG ULLMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE*

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Supreme Court of the United States

OCTOBER TERM, 1954

No. _____

WILLIAM LUDWIG ULLMAN, Petitioner

vs.

UNITED STATES OF AMERICA

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for Emergency Civil Liberties Committee, respectfully moves this Honorable Court for permission to file the accompanying brief, as *amicus curiae*, in support of a petition for a writ of certiorari. Permission for leave to file has been requested from the Solicitor General of the United States but such permission has been refused. The reason given for refusal by the Solicitor General was, as stated in his letter, "I have concluded, however, that I should not consent to your filing such a brief, particularly since Rule 42(1) of the Rules of the Supreme Court indicates that briefs amicus curiae at the petition stage are not favored by the Court. You understand I am sure that you may file a motion under that Rule for leave to file your brief." While aware that it is true that such briefs as this are not favored by the Court at the petition stage, we hope that the rule is not

indexible and that where, as in the instant case, a grave constitutional issue is present, involving fundamental rights of all our citizens and where the decision whether to grant a writ of certiorari may be crucial, exception to what is undoubtedly a wise rule to conserve the time of the members of the Court may be found possible. The attorneys for the petitioner have consented to the filing of this brief.

WHEREFORE, it is respectfully requested that this Honorable Court grant this motion to file the annexed brief as *amicus curiae*.

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Supreme Court of the United States

OCTOBER TERM, 1954.

No. _____

WILLIAM LUDWIG UHLMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

BRIEF AS FRIEND OF THE COURT

It is with the deepest concern over what we believe to be threats to Civil Liberties in our country, whose traditions of freedom we cherish, that the undersigned, Emergency Civil Liberties Committee, has requested permission to file this brief. The Emergency Civil Liberties Committee is a non-partisan organization which is opposed to all authoritarian regimes and practices and believes in civil liberties for all.

We hold as a firm tenet of our faith that violent revolutions should never be resorted to in a society where orderly change through the will of the people, freely expressed at the polls, is possible. We believe, however, that radicals as well as liberals and conservatives must, in such a society as ours, be guaranteed the right, within the framework of the democratic process, to urge changes which they seek. They should enjoy peacefully the guarantees of personal liberty contained in the Bill of Rights which are the basis of democracy and we have noted with concern what Chief Justice Warren has recently described as the "eroding of our liberties."

In no area is this tendency more apparent than in the attempt to water down or nullify the protections against

self incrimination contained in the Fifth Amendment. Because we attach the utmost importance to the values which inhere in the Fifth Amendment, we view with grave misgivings the Act under consideration in the instant case under which petitioner has been ordered to testify despite his claim of the privilege against self incrimination.

POINT ONE

The Compulsory Testimony Act of 1954 violates the constitutional prohibition of the Fifth Amendment against requiring a person in a criminal case to be a witness against himself.

We are living again in one of those historic periods when hard won freedoms are being challenged in the name of expediency. In the name of security the rights of the individual person are being more and more impaired. Great tensions in international relations and the fears engendered by new and dreadful weapons have created an atmosphere in which legislators move from one invasion of our traditional liberties to another. In the statute under review it is the time honored privilege against self-incrimination which is threatened. Dean Erwin N. Griswold, of Harvard University Law School, in *The Fifth Amendment Today*, says at page 7:

> "I would like to venture the suggestion that the privilege against self incrimination is one of the great landmarks in man's struggle to make himself civilized. . . . the significance of the privilege over the years has perhaps been greatest in connection with resistance to prosecution for such offenses as heresy or political crimes. *In these areas the privilege against self-incrimination has been a protection for freedom of thought and a hindrance to any government which might wish to prosecute for thoughts and opinions alone.*" (Emphasis supplied.)

We have in the instant case the unusual situation that all three of the judges of the United States Circuit of

Appeals for the Second Circuit have made it evident in their opinions that they would have declared the statute unconstitutional if they had not felt themselves to be bound by the decision of this Court in *Brown* v. *Walker*, 161 U. S. 591. But this Court, under changed conditions or in different circumstances, as witness the recent memorable decision in the school segregation cases, has not hesitated to overrule a previous decision of its own. Especially should this be the case when, as in *Brown* v. *Walker*, *supra*, the decision was by a vote of 5 to 4, when the dissenting opinions were so persuasive and when the area involved was not, as now, the critical area of freedom of speech and association. It is when we recall the Star Chamber and the names of Lilburne and Bradford that we discover the true significance of the protection against self-incrimination and why the Founding Fathers wrote it into the Bill of Rights as one of the tenets of their belief that there are areas of personal right into which government may not intrude. Whatever the validity of *Brown* v. *Walker*, *supra*, may be, it does not really touch on the problem of individual freedom which gave rise to the privilege against self-incrimination, although Justice Field recognized that problem as being present even in a case which did not impinge directly on freedom of thought and association when he said at page 637:

> "The essential cruelty of compelling a man to expose his own guilt is obvious to everyone and needs no illustration."

He went on to appraise the statement that the privilege is the

> "result of the long struggle between the opposing forces of the spirit of individual liberty on the one hand and the collective power of the State on the other."

As the petitioner's brief shows, he has been interrogated over and over again since Elizabeth Bentley named him, he has categorically denied all allegations of crime, he has

never been indicted and prosecuted for substantive crime, as he should have been long ago if the government had real belief in and support for the Bentley charges. Under the circumstances, he may well have felt that if he did not invoke the privilege he might be entrapped. Surely there must be a point where a man may be justified in saying that he has spoken enough.

We concur in the forthright statement of Senator Hoey when he said:

> "I am opposed to the entire bill. I believe we are going right in the face of the Constitution" (99 Cong. Rec. 4742).

POINT TWO

The immunity law does not provide full immunity to the political dissenter in a time when the political heretic is faced with social and economic penalties unprecedented in the history of our country.

It is basic to the validity of an immunity statute that the protection afforded by the statute must be "co-extensive with the constitutional privilege." It must, as was held in *Counselman* v. *Hitchcock*, 147 U. S. 547, be absolute. We pass over what we believe to be the failure of the statute to provide full immunity from either Federal or State disabilities to what we consider even more vital in distinguishing the situation now before the Court from that which it confronted in *Brown* v. *Walker*, *supra*. Political heresy in such a climate as we have today was not then before the Court. At the point where he discussed the effects of disclosure on petitioner's good reputation, Mr. Justice Brown, curiously enough, assumed that he had committed a crime, although as Mr. Justice Shiras pointed out no such assumption was warranted. In stating at page 605 that if the proposed testimony is material to the issue, the fact that it would "tend to degrade the witness in public estimation"

[illegible] not avail him. Mr. Justice Brown gave the following reason why this does not exempt him from disclosure:

> "A person who *commits a criminal act* is bound to contemplate the consequences of exposure to his good name and reputation and ought not to call upon the courts to protect that *which he has himself esteemed to be of little value.*" (Emphasis supplied.)

But Mr. Justice Shiras effectively disposed of what we believe was a misconception of the law in Mr. Justice Brown's opinion when he said at page 598:

> "A moment's thought will show that a perfectly innocent person may expose himself to accusation, and even condemnation, by being compelled to disclose facts and circumstances known only to himself, but which he may be entirely unable to explain as consistent with his innocence."

Dean Griswold in *The Fifth Amendment Today*, which we have previously mentioned, gives interesting examples beginning on page 12 of the ways in which innocent persons may be entrapped when not protected by the provision of the Fifth Amendment. These dangers are enhanced by the 14 criteria which may be used as evidence of Communist Party membership enacted in the Communist Control Act of 1954.

To the extent that the majority opinion in *Brown v. Walker, supra*, was based on the assumption that the petitioner there was guilty of criminal conduct, the opinion is not binding in the instant case where there not only is no presumption of guilt but where all the circumstances, including petitioner's sworn denials and the failure of the government after many years to indict him on the basis of the Bentley testimony, support the presumption that there is no implication of criminality from his execution of his constitutional privilege.

It is interesting also that Mr. Justice Brown indicated on page 593 the ease with which questions put to him

(the witness) may assume an inquisitorial character and to *entrap him into fatal contradictions*" and that Mr. Justice Shiras indicated at page 628 the danger of prosecution for perjury as being one of the risks that the immunity law did not guard against. Certainly, if that danger was present there, the danger of entrapment is even more present today with a stable of paid informers of doubtful veracity at the government's disposal and the experience of even so distinguished an educator as Dr. Lattimore (*United States* v. *Lattimore*, 215 Fed. 2nd 847) and of the defendants in *U. S.* v. *Neff*, 212 Fed. 2nd 297; *U. S.* v. *Gebl.*, U. S. C. A. D. C. 12352; *U. S.* v. *Remington*, 191 Fed. 2nd 246, and *U. S.* v. *Bridges*, 199 Fed. 2nd 811, reversed 346 U. S. 209, showing the use which will be made by the government of the statements of dissenters while informers who have served the government, who are self-confessed perjurers, go free.

Not only is the danger of entrapment greater than when *Brown* v. *Walker, supra*, was decided, but the social and economic penalties which may be imposed on a dissenter are different not only in degree but in kind. Nothing of the sort of community sanctions which might be visited on the petitioner threatened the auditor in that case. They include the possibility that one may not even be able to make a living except in the most menial occupations, loss of union or professional status, discrimination in housing and educational facilities and public opprobrium which is not confined to the witness himself but may be visited on his wife and children or even on more remote relatives and associates.

The members of this Honorable Court are certainly aware of the frightening spread of the area of repression. The degree to which constitutional guarantees of freedom of speech and conscience have been impaired has been increasingly viewed with apprehension by clergymen, educators and commentators at home and has caused dismay among our friends abroad. Have we, the most powerful

and least vulnerable of the democracies, shall lose our faith in the value and safety of allowing truth and error to meet in the arena of public discussion and adopted in practice the very methods which in theory we oppose." Over three years ago Mr. Justice Douglas said in an article in New York Times Magazine for January 13, 1952, entitled *The Black Silence of Fear*, that "there is an ominous trend in this nation. We are becoming tolerant only of the orthodox point of view; intolerant toward new and different approaches."

In the able brief in *Emspak v. United States*, recently submitted to this Court on behalf of the petitioner Emspak, a score of pages in the appendix were given over to quotations from prominent editors, religious leaders, commentators and business and political leaders expressing the fears which were so well summarized in the pronouncement of the General Council of the Presbyterian Church in the United States of America, on November 2, 1953, entitled a letter to Presbyterians wherein it was said:

> "Under the plea that the structure of American society is in imminent peril of being shattered by a satanic conspiracy, dangerous developments are taking place today in our national life. Favored by an atmosphere of intense disquiet and suspicion, a subtle but potent assault upon basic human rights is now in progress. . . . Treason and dissent are being confused. The shrine of conscience and private judgment, which God alone has a right to enter, is being invaded. Un-American attitudes toward ideas and books are becoming current. Attacks are being made upon citizens of integrity and social passion which are utterly alien to our democratic tradition. They are particularly alien to the Protestant religion which has been a main source of the freedoms which the people of the United States enjoy." New York Times, November 3, 1953.

Can there be any doubt that the immunity Act here under consideration is one of the last and worst of the anti-

freedom measures recently enacted by Congress. Can there be any doubt that the Fifth Amendment has played a highly important role, particularly in times such as these, in protecting the individual against the awe-inspiring power of the state? Can there be any question but that the Immunity Act permits a further invasion "into the shrine of conscience and private judgment"?

The recently decided *Regan* case, not yet reported, is distinguishable from the instant case both because there the peculiar provisions of the New York law, including the provision under which Regan had signed a waiver, were involved and more especially that the *Regan* case did not fall within the area of political dissent.

We urge upon the Court, even if the doctrine of *Brown v. Walker, supra*, is still to be applied in the ordinary criminal case, that in such a time as that in which we live, even if it grants full judicial immunity, the Immunity Act does not and cannot grant immunity co-extensive with the real injury that an admission of political heresy might entail. Radicals and conservatives alike have important contributions to make to democratic decisions and democracy advances through compromises between differing viewpoints, freely and fearlessly expressed. But today, the admission of political heresy effectively bars the dissenter from public, and increasingly wide areas of private employment. It is not merely admission of membership in the Communist Party but adherence to any of the more than two hundred organizations decided by the Attorney General of the United States, acting as accuser, judge and jury, to be subversive which may involve economic and social disaster.

In *Wieman v. Updegraff*, 344 U. S. 183, Mr. Justice Clark in condemning the use of the Attorney General's list as a basis of loyalty oaths indicated the social consequences which are visited upon the person excluded from public employment at page 190 in these words:

> "There can be no dispute about the consequences visited upon a person excluded from public employ-

ment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed it has become a badge of infamy."

Equally, admissions wrung from a man against his will of membership in so-called subversive organizations, which might become a link in a chain, can become a badge of infamy and a danger to his livelihood against which a spurious immunity cannot protect him.

In a notable advisory opinion with regard to whether a proposed law in Massachusetts to force private and public educational institutions to dismiss teachers for refusing to testify regarding alleged subversive activities on the basis of the Fifth Amendment, reported in the Journal of the House for April 13, 1955, the Justices of the Supreme Judicial Court of Massachusetts made findings which are equally pertinent to the situation in the instant case, where on page 1111 they said:

"It is plain that the proposed section 30B, if enacted into law, and if valid, would apply to a person who had exercised his right under either Constitution at any trial or duly constituted hearing or inquiry, whether within or outside the Commonwealth, to refuse to answer questions pertinent to his membership in the Communist Party, whether present or past, without limitation of time.

"It is the very cornerstone of our system of government that none of the three great departments, the legislative, the executive or the judicial can destroy or impair the constitutional rights of any person. All branches of the government are alike bound by the constitutional mandate. Therefore it must be clear that if the General Court should pass a purported statute to the effect that no teacher should avail himself of his right not to testify or furnish evidence against himself, such purported statute would be in direct contradiction of the constitutional provisions and would be void. So would a statute that should seek to penalize as by fine or imprisonment one who should seek to exercise his constitutional right. It is true that the proposed statute does not quite do either of the things

gust suggested: *But it does something of comparable effect. It makes an indirect but hardly less serious attack upon the constitutional right.* * *

We are of the opinion that the proposed section 3013 would be unconstitutional as an interference with the exercise of the constitutional privilege against self-incrimination.

These consequences would be visited upon a person who had committed no crime, but had merely availed himself of his constitutional right; for it cannot be too often emphasized that the exercise of his privilege not to incriminate oneself does not prove guilt. The privilege is designed to protect the innocent even though it may often be used to shield the guilty." (Emphasis supplied.)

In the Immunity Act we also have an indirect but nevertheless serious attack upon the constitutional right. During this period when First Amendment protections have been seriously if not fatally weakened, the Fifth Amendment has proved to be the only shelter for many a dissenter from the storm which rages about him.

CONCLUSION

Truly, as Lowell said, "New occasions teach new duties." Today is not the same day in which *Brown* v. *Walker*, *supra*, was decided and the situation presented by instant case is not comparable to that presented in that earlier decision. The immunity granted by the statute under consideration is not and cannot be commensurate with the dangers which face petitioner if his constitutional privilege is removed.

We urge this Honorable Court to grant certiorari to permit these questions to be considered.

Respectfully submitted,

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APPENDIX A

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